267 NLRB No. 25

D--9870 Denver, CO

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BIG D SERVICE CO.

and

Case 27--CA--8076

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL NO. 9, AFL--CIO

DECISION AND ORDER

Upon a charge filed on 1 October 1982 by Sheet Metal Workers International Association, Local No. 9, AFL--CIO, herein called Local 9, and duly served on Big D Service Co., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 27, issued a complaint on 12 November 1982 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

The complaint alleges that Respondent, through the Colorado
Association of Sheet Metal and Air Conditioning Contractors,
herein called the Association, of which it is a member, and Local

9 executed and are bound by a collective-bargaining agreement covering employees in the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeyman sheetmetal workers and apprentices engaged in but not limited to the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all metal work but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The complaint also alleges that Local 9 has been, and is now, the exclusive representative of all the employees in said unit, including the employees of Respondent, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment; and, further, that the most recent applicable collective-bargaining agreement executed on behalf of the unit employees is effective from 1 May 1981 through 30 June 1983.

Regarding the unfair labor practices, the complaint alleges that: Since on or about 1 April 1981, and at all times thereafter, Respondent refused and continues to refuse to bargain collectively with the Union as the exclusive collectivebargaining representative of all the employees in said unit. Respondent has refused to make contributions to the various trust funds as provided in the collective-bargaining agreement and

Since Respondent did not raise Sec. 10(b) of the Act as an affirmative defense to the alleged unfair labor practice which occurred on 1 April 1981, such a defense is deemed waived and the Board can rule on this allegation.

since on or about 9 April 1982 otherwise has not abided by any and all the terms of the agreement and, for these reasons, has repudiated the agreement.

On 25 January 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, with exhibits attached. Subsequently, on 27 January, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent has not filed an answer to the complaint or a response to the Notice To Show Cause.

Consequently, the allegations of the Motion for Summary Judgment

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

stand uncontroverted.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides as follows:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to

be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing, issued on 12 November 1981 and duly served on Respondent on 2 December specifically states that Respondent shall, within 10 days of service thereof, file an answer with the Regional Director for Region 27, and that, unless it does so, all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board. Respondent has not filed an answer to the complaint.

On 25 January 1983 counsel for the General Counsel filed the Motion for Summary Judgment herein, and on 27 January the Board issued a Notice To Show Cause why the General Counsel's motion should not be granted. Respondent did not file a response thereto and, no good cause to the contrary having been shown in accordance with the rule set forth above, the allegations of the complaint are deemed to be admitted and found to be true. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. Jurisdiction

Big D Service Co. is, and has been at all times material herein, a corporation with its main office and principal place of business in Denver, Colorado, where it is engaged in the business of sheet metal contracting in the construction industry. Big D Service Co. has been, and is now, a member of the Association which exists for the purpose of representing its employer-members in negotiating and administering collective-bargaining agreements

with various labor organizations, including the Union herein.

Annually, the employer-members of the Association collectively in the course and conduct of their business operations purchase and receive goods and materials at their respective places of business at Denver, Colorado, directly from points and places outside the State of Colorado valued in excess of \$50,000.

We find, on the basis of the foregoing, that Respondent, through its membership in the Association, is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Sheet Metal Workers International Association, Local No. 9, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Unit

Since on or about 7 April 1977, and at all times material herein, Local 9 has been, and is now, the lawfully designated exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees:

All journeyman sheetmetal workers and apprentices engaged in but not limited to the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all metal work but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about 1 January 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing in or about April 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

C. The 8(a)(5) and (1) Charges

Since on or about 7 April 1977, and at all times material herein, Respondent, by virtue of its membership and assignment of bargaining rights to the Association, has been party to successive collective-bargaining contracts between the Association and the Union including the present agreement covering the period from 1 May 1981 to 30 June 1983.

Since 1 April 1981 Respondent has repudiated the agreement by refusing to make contributions to the various trust funds as provided in said agreement and by hiring employees and calling such employees 'contract labor,' contrary to the collective-bargaining agreement. In addition, since on or about 9 April 1982, Respondent has repudiated the agreement by refusing to abide by any and all terms of the agreement.

Accordingly, we find that Respondent has since in or about April 1981 refused to bargain collectively with Local 9 as the exclusive representative of the employees in the aforesaid unit

and has refused to make contributions to the various trust funds as provided in the agreement.² Moreover, since 9 April 1982

Respondent has refused to abide by any terms of the agreement.

For the above-stated reasons, we find that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.³

IV. The Effect of the Unfair Labor Practices Upon Commerce

The conduct of Respondent set forth in section III, above,
occurring in connection with its operations described in section
I, above, has a close, intimate, and substantial relationship to
trade, traffic, and commerce among the several States and tend to
lead to labor disputes burdening and obstructing commerce and the
free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit.

The existing collective-bargaining agreement provides that Respondent shall make contributions to the following fringe benefit funds: Retirement plan, welfare plan, vacation plan, training fund, industry fund, and the National Stabilization Agreement of Sheet Metal Industry.

The Board has ruled that an industry fund is a permissive, nonmandatory subject of bargaining and that an employer does not violate Sec. 8(a)(5) in failing to make such payments. See Finger Lakes Plumbing & Heating Co., Inc., 254 NLRB 1399 (1981). Accordingly, we shall dismiss this portion of the allegation from the complaint. Chairman Dotson considers this case a default judgment case with no NLRB precedential value.

We shall further order Respondent to make whole the employees in the unit found appropriate for any loss of wages or other benefits which they may have sustained as a result of Respondent's failure to make trust fund contributions and its repudiation of the bargaining agreement, including paying all contributions to the vacation plan, retirement plan, welfare plan, training fund, and the National Stabilization Agreement of Sheet Metal Industry as provided in the agreement of 1 May 1980 through 30 June 1983, to which Respondent is bound, and which would have been paid absent Respondent's unlawful discontinuance of such payments, and to post the attached notice. This makewhole remedy shall include reimbursing employees for contributions they themselves may have made for the maintenance of their coverage for benefits after Respondent unlawfully ceased making contributions, for expenses ensuing from Respondent's unlawful action, and for any premiums they may have paid to third-party insurance companies for coverage heretofore provided by the welfare plan. 4 Respondent will also be required to preserve and, upon request, make available to authorized agents of the Board all records necessary or useful in determining compliance with the Order herein.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Any interest due on trust fund payments shall be made in accordance with the criteria set forth in Merryweather Optical Company, 240 NLRB 1213 (1979). Interest on the remaining backpay sums shall be paid in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977). See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Conclusions of Law

- 1. Big D Service Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- Sheet Metal Workers International Association, Local No.
 AFL--CIO, is a labor organization within the meaning of
 Section 2(5) of the Act.
- 3. All journeyman sheetmetal workers and apprentices engaged in but not limited to the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all metal work but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
- 4. Since April 1977, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
- 5. By refusing in or about April 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
- 6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering

with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations

Act, as amended, the National Labor Relations Board hereby orders
that the Respondent, Big D Service Co., Denver, Colorado, its

officers, agents, successors, and assigns, shall:

- Cease and desist from:
- (a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Sheet Metal Workers International Association, Local No. 9, AFL--CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All journeyman sheetmetal workers and apprentices engaged in but not limited to the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all metal work but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Repudiating, failing to honor, or refusing to abide by and apply the terms of the collective-bargaining agreement between the Colorado Association of Sheet Metal and Air Conditioning Contractor and Local 9.

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- (c) Unilaterally discontinuing the contributions to the retirement plan, welfare plan, vacation plan, training fund, and the National Stabilization Agreement of Sheet Metal Industry as provided for in the applicable collective-bargaining agreement.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
- 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:
- (a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.
- (b) Restore and place in effect all terms and conditions of employment as provided in the above-described agreement which was repudiated by Respondent.
- (c) Make such welfare fund, pension, and other fund payments on behalf of those employees in the above unit for whom such contributions were previously made and would have continued to be made had Respondent not unlawfully ceased making such payments.
- (d) Make whole all of its employees for any loss of wages or other benefits that they may have suffered as a result of Respondent's unlawful refusal to bargain with Local 9. This shall include reimbursing employees for contributions they themselves may have made for the maintenance of their coverage for benefits after Respondent unlawfully ceased making contributions, for

expenses ensuing from Respondent's unlawful action, and for any premiums employees may have paid to third-party insurance companies for coverage heretofore provided by the welfare plan, plus interest.

(e) Post at 1986 South Cherokee, Denver, Colorado, copies of the attached notice marked ''Appendix.''⁵ Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

(f) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C.

10 August 1983

	Donald L. Dotson,	Chairman
	Howard Jenkins, Jr.,	Member
	Don A. Zimmerman,	Member
(SEAL)	NATIONAL LABOR RELATI	ONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT refuse to bargain collectively and in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with Sheet Metal Workers International Association, Local No. 9, AFL--CIO, as the exclusive representative of the employees in the following unit found appropriate for the purposes of collective bargaining:

All journeyman sheetmetal workers and apprentices engaged in but not limited to the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all metal work but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT repudiate or fail to honor, abide by, and apply the terms of the collective-bargaining agreement between the Association and the Union referred to above.

WE WILL NOT unilaterally discontinue the contributions to the retirement plan, welfare plan, vacation plan, training fund, and the National Stabilization Agreement of Sheet Metal Industry as provided for in the applicable collective-bargaining agreement referred to above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit described above.

WE WILL honor, abide by, and apply the terms of the existing collective-bargaining agreement referred to above. WE WILL make whole unit employees for any loss of wages or other benefits, including transmitting the contributions owed to the retirement plan, welfare plan, vacation plan, training fund, and the National Stabilization Agreement of Sheet Metal Industry pursuant to the terms of the above-referred-to collective-bargaining agreement with the Union. This shall include reimbursing employees for any contributions they themselves may have made for the maintenance of the welfare plan after we unlawfully discontinued contributions to such plan, for expenses ensuing from our unlawful action, and for any premiums they may have paid to third-party insurance companies for coverage heretofore provided by the plan.

WE WILL pay to the employees appropriate interest on such money.

			BIG	D SERVICE CO.	
			(Employer)		
Dated	 Rν				
Dacca	D į	(Representative)		(Title)	

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Room 260, 721 19th Street, Denver, Colorado 80202, Telephone 303--327--3553.